THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re Zillow Group, Inc. Securities Litigation This Document Relates to: All Actions	Master File: C17-1387-JCC **DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)** NOTED ON MOTION CALENDAR: FEBRUARY 6, 2019 ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The Second Amended Complaint does not even attempt to address most of the defects that this Court identified in its order dismissing the prior complaint, and does not contain *any* new particularized factual allegations that would change the result. Aside from cosmetic changes and repackaged theories that the Court has already rejected, the Second Amended Complaint (Dkt. No. 47 ("SAC")) is scarcely different from its predecessor. Plaintiffs added a short set of conclusory assertions from a new "anonymous witness," AW2, SAC ¶¶ 43–44, but the allegations are simply a variation on the insinuations that this Court addressed with the anonymous witness mentioned in the first amended complaint (Dkt. No. 35 ("FAC")), AW1. They do not "contain particularized factual allegations" showing any violations of the Real Estate Settlement Procedures Act ("RESPA") (or any other law), "much less how such violations occurred," and thus they cannot constitute the requisite particularized factual allegations needed to support falsity or a strong, cogent, and compelling inference of scienter. *In re Zillow Grp., Inc. Sec. Litig.*, 2018 WL 4735711, at *12 (W.D. Wash. Oct. 2, 2018).

Aside from these conclusory assertions, Plaintiffs make no attempt to (because they cannot) demonstrate that co-marketing agents were providing unlawful referrals to lenders, and thus their first theory of RESPA liability remains unsupported and unsupportable. Plaintiffs' attempt to rework their alternative theory, that Zillow's advertising services sold through the co-marketing program were not "fair market value" and fall outside the safe harbor under Section 8(c) of RESPA, likewise fails as groundless speculation. Plaintiffs' final theory of alleged "substantial assistance" of RESPA violations fails as a matter of law.

In dismissing the prior complaint, the Court instructed Plaintiffs, in the event that they chose to file a second amended complaint, that they must plead particularized facts demonstrating that Zillow designed its business to violate the law, encouraged third parties to violate the law, made false or misleading statements about the Company's compliance with the law, and caused the losses alleged by Plaintiffs. 2018 WL 4735711, at *18. Plaintiffs have not done so. Their failure to address the many defects identified by the Court demonstrates that they

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do not have facts sufficient to support their claims.

In fact, Plaintiffs have admitted as much in their counsel's belated attempt to obtain documents through a Freedom of Information Act ("FOIA") action against the Consumer Financial Protection Bureau. Plaintiffs' counsel represented to the U.S. District Court for the District of Columbia that "[t]he fruits of Plaintiff's FOIA request *will be critical* to alleging the additional facts needed to support the class action plaintiffs' claims." *Baker v. CFPB*, 2018 WL 5723146, at *4 (D.D.C. Nov. 1, 2018) (emphasis added).[1] As Plaintiffs' counsel predicted, the Second Amended Complaint contains none of the "additional facts needed" to state a claim under the federal securities laws.

If Plaintiffs request additional time to search for facts that might support their claims, whether through their FOIA action or otherwise, the Court should deny any such request as futile and inconsistent with the letter and spirit of the Private Securities Litigation Reform Act ("PSLRA"). The SAC should be dismissed with prejudice and without leave to amend.

II. BACKGROUND

A. This Court's Order Dismissing the Prior Complaint

As the Court set forth in its prior order dismissing the FAC, Zillow Group, Inc. ("Zillow") is "an online leader in real estate marketing. Through its website and online applications, the company provides users with information about homes, real estate listings, and mortgages. Zillow's primary source of revenue comes from real estate agents who pay to have their properties listed on Zillow's digital platforms." 2018 WL 4735711, at *1 (citations omitted).[2] Agents pay Zillow when a user views a listing (an "impression"). *Id.* When users elect to send their contact information to an agent, the agent receives a "lead." *Id.* Under

[1] Defendants request that the Court take judicial notice of filings made and orders issued in the FOIA action, which are matters of public record. *See, e.g.*, *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *Yusuf v. Jail-Mrjc*, 2016 WL 7665914, at *1 (W.D. Wash. Dec. 15, 2016).

[2] For efficiency, and in view of the Court's familiarity with this action, Defendants will not restate each point made in support of the prior motion to dismiss or each aspect of the Court's prior order granting that motion, although they do expressly preserve those points, including for purposes of any appeal by Plaintiffs. Defendants also respectfully refer the Court to the matters for which judicial notice was granted in connection with the prior motion to dismiss. Dkt. Nos. 38, 43, 46.

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Zillow's "co-marketing program," lenders may pay a portion of an agent's advertising costs and appear alongside the agent on a listing as a "preferred lender," and may receive leads as well if users decide to provide them with contact information. *Id.*

Plaintiffs allege that this co-marketing program violates Section 8(a) of RESPA, which "prohibits giving or accepting 'any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.'" *Id.* at *5. The law thus targets *referrals*, which Zillow does not provide. Nevertheless, as the Court summarized in its prior order, Plaintiffs have attempted to describe Zillow's co-marketing program as a referral program: "Plaintiffs allege that the co-marketing program acted as a vehicle to allow real estate agents to make illegal referrals to lenders in exchange for the lenders paying a portion of the agents' advertising costs to Zillow." *Id.* Additionally, "Plaintiffs allege that the co-marketing program facilitated RESPA violations by allowing lenders to pay a portion of their agents' advertising costs that was in excess of the fair market value for the advertising services they actually received." *Id.*

The Court dismissed Plaintiffs' FAC on October 2, 2018. In its dismissal order, the Court held that Plaintiffs satisfied none of the exacting pleading standards of the PSLRA and "failed to sufficiently plead either theory of RESPA liability." *Id.*

First, the Court concluded that Defendants' statements "could not have been false or misleading" because there was no basis for Plaintiffs' claims that Defendants violated RESPA. *Id.* The Court rejected Plaintiffs' theories of RESPA liability, concluding that they had failed to allege particularized facts showing that Zillow's co-marketing program was itself illegal (per se or otherwise), that agents were providing unlawful referrals to lenders, or that lenders were paying more than fair market value for advertising services through the program. *Id.* at *5–9. The Court concluded that without such facts, Plaintiffs cannot demonstrate that Defendants' statements—including that they have always "intended" and "endeavored" to comply with the law—were untrue or misleading. *Id.* at *9–10, 17.

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Second, the Court specifically rejected Plaintiffs' allegations concerning the individual Defendants' state of mind. Among other things, the Court concluded that Mr. Rascoff's and Ms. Philips's thorough preparation for earnings calls supports the inference that they wanted to make only accurate statements on those calls, not that they necessarily would have been aware of any alleged violations of RESPA. *Id.* at *14–15. The Court noted that Plaintiffs' allegations gave rise to innocent inferences, including the inference that a webinar about the Company's co-marketing program demonstrated "that Zillow thought the co-marketing was *legal*," and not that Zillow was making "a public announcement that the company and its users were breaking the law." *Id.* at *16 (emphasis added).

Third, and for similar reasons, the Court held that Plaintiffs had failed to allege loss causation. *Id.* at *17.

The Court dismissed Plaintiffs' claims with leave to amend, and it set forth five specific instructions in the event they sought to cure the deficiencies of the FAC: Plaintiffs would be required to assert particularized factual allegations demonstrating that (1) "Zillow designed the co-marketing program to violate RESPA"; (2) "Zillow was instructing and encouraging third-parties to commit such violations"; (3) "Defendants made material false or misleading statements regarding the co-marketing program's compliance with RESPA"; (4) "Defendants' statements evinced a strong inference of scienter"; and (5) "such statements caused the loss alleged." *Id.* at *18.

B. The Second Amended Complaint

Notwithstanding the Court's specific instructions, Plaintiffs filed an SAC nearly identical to the FAC. So far as Defendants can discern, Plaintiffs have made only six changes meriting any discussion. First, they have revised the allegations concerning the anonymous witness mentioned in the FAC, AW1. Now, according to AW1, a former "Regional Sales Manager," lenders participated in the co-marketing program because they "expected real estate agents to refer business." SAC ¶ 42. The SAC does not report the basis of AW1's opinion, nor does it supply an example of any such referral.

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Second, Plaintiffs have added allegations from AW2, a former "Sales and Operations Trainer." Plaintiffs say that according to AW2, "[e]veryone knew that the lenders paid the agents for leads and referrals," and appear to suggest that one lender violated Zillow policies by paying for all of an agent's marketing costs. *Id.* ¶¶ 43–44. As with the opinion attributed to AW1, the SAC does not report the basis of AW2's opinion about this purportedly common knowledge. Nor does the SAC supply an example of a paid referral. *Id.* ¶ 44.

Third, Plaintiffs now assert that "mortgage originator Prospect Mortgage entered into a consent judgment with the CFPB where it admitted to violating Section 8 of RESPA." SAC ¶ 46. Plaintiffs assert, without further explanation, that "[t]he website as described in that consent judgment mirrors Zillow's premier agent product and no other website that operated during the relevant time frame." *Id.*

Fourth, Plaintiffs have reframed their prior allegations concerning an unrelated wrongful-termination suit filed against Zillow. SAC ¶¶ 50–51.

Fifth, Plaintiffs now argue that the co-marketing program "does not fall within [RESPA's] safe harbor because Zillow's co-marketing pricing is drastically more expensive for lenders than comparable product offerings by Zillow." SAC ¶ 48. As with the prior complaint, this argument depends on convoluted arithmetic and a myopic view of the co-marketing program not supported by any particularized facts. *See id.*

Sixth, the SAC now advances the novel legal theory (previously argued in Plaintiffs' brief opposing the prior motion to dismiss) that the Consumer Financial Protection Act imposes liability for aiding and abetting violations of RESPA, and contends that Zillow is liable for "substantially assist[ing] lenders and agents who violated RESPA." SAC ¶¶ 54–55.

None of these changes warrants a different result.

III. ARGUMENT

As this Court noted, "[t]o state a claim for securities fraud under Section 10(b) and Rule 10b-5, a plaintiff must allege: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale

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of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *In re Zillow Grp., Inc. Sec. Litig.*, 2018 WL 4735711, at *4 (citations and internal quotation marks omitted). The SAC must "satisfy the dual pleading requirements of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act." *Id.* Under the PSLRA, a complaint alleging securities fraud must plead particularized facts demonstrating both falsity and scienter. *Id.* (citing 15 U.S.C. § 78u-4(b)). "Congress enacted the PSLRA to deter opportunistic private plaintiffs from filing abusive securities fraud claims . . . ." *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 973 (9th Cir. 1999) (citation omitted). It therefore imposed heightened standards to "prevent[] a plaintiff from skirting dismissal by filing a complaint laden with vague allegations of deception unaccompanied by a particularized explanation stating *why* the defendant's alleged statements or omissions are deceitful." *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). Plaintiffs again fail to satisfy these high standards.

A. The SAC Again Fails to Plead Falsity.

The SAC focuses on the same allegedly false statements as the prior complaint. As they did in the FAC, Plaintiffs primarily rely on statements in Zillow's Forms 10-K that Zillow "intend[ed]" and "endeavor[ed]" to ensure that any content Zillow creates is consistent with the "federal laws and regulations relating to real estate, rentals and mortgages" to which Zillow's "customers and advertisers" are subject, even though Zillow did not believe it was subject to those laws, and that the legal landscape was "constantly evolving." SAC ¶¶ 63, 67, 68, 77, 82. Plaintiffs also point to Zillow's representation to Trulia as part of a merger agreement that Zillow was in compliance with the laws that were applicable to it (a contractual warranty included in an SEC filing that also disclosed to investors Zillow's belief that it was not subject to RESPA). SAC ¶¶ 65–66. And Plaintiffs also cite statements by Mr. Rascoff and Ms. Philips, the Company's CEO and then-CFO respectively, that they believed the Zillow co-marketing program was designed in a way that allowed participants to comply with the law. SAC ¶¶ 58, 96.

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As this Court previously found, adequately pleading falsity for such statements requires Plaintiffs "to demonstrate Defendants *intended* the co-marketing program to violate RESPA" and that "Zillow or third parties were *actually* violating the statute." 2018 WL 4735711, at *9–10 & n.13 (citing *In re LifeLock, Inc. Sec. Litig.*, 690 F. App'x 947, 951–52 (9th Cir. 2017)) (emphases added). The prior complaint failed to do either, and so does the SAC.

1. Plaintiffs' anonymous witness allegations do not demonstrate that Defendants violated RESPA.

Plaintiffs' anonymous witness allegations do not cure the deficiencies the Court identified the last time around. The Court previously concluded that the AW1 allegations failed to demonstrate that Zillow altered its co-marketing program to remedy purported RESPA violations. 2018 WL 4735711, at *12. Plaintiffs do not attempt to improve on that theory. Instead, they have reworked the AW1 allegations to focus on a different theory: that the volume of leads received by lenders is supposedly worth less than the amount those lenders pay as part of co-marketing, and so, Plaintiffs speculate, agents must be compensating the lenders by other means—namely, with referrals. SAC ¶ 41–42. But these new allegations are just as reliant on vague rumors and conjecture, rather than particularized facts. For example, AW1 simply asserts, without the support of any particularized factual allegations, much less "specific" instances as the Court required, that agents regularly "refer[red] business" to lenders. SAC ¶ 42.

Moreover, AW1's speculation is inconsistent with the rest of the complaint. For example, AW1 seems to suggest that lenders receive leads rarely, on the theory that "lenders are only notified or in receipt of a lead when the consumer 'clicking' on the real estate agent profile also checks the box requesting information about the lender or seeking pre-approval information." SAC ¶ 41. But that allegation is at odds with the SAC's other allegations that contacting lenders is an opt-*out* rather than opt-*in* process. *See, e.g.*, SAC ¶ 5 (customers contacting agent "could opt out of having their lead provided to a lender by unchecking the box"); ¶ 30 (both noting and showing with a screen capture that "[t]he box is checked by default"); ¶ 38 ("a prospective home buyer can opt out of Zillow forwarding their information to

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a co-marketing lender"). AW1's vague assessment of the frequency with which lenders secure leads in comparison to agents—"consumers rarely request this information," and "lenders receive minimal leads"—is also contradicted by the SAC's other allegations. *See id.* ¶¶ 38–39 ("on average, the lenders receive 40 contacts for every hundred contacts received by the agent"). Such inconsistencies are reason enough to disregard the AW1 allegations. *See, e.g.*, *Gammel v. Hewlett-Packard Co.*, 905 F. Supp. 2d 1052, 1077 (C.D. Cal. 2012) (claims "undermined by . . . inconsistent allegations"). And to the extent that AW1's allegations are meant to show that lenders somehow received less than fair market value for their marketing payments, they are inadequate on that score as well, *see* part III.A.2, *infra*.

The AW2 allegations come no closer to pleading falsity. Paragraphs 43 and 44 of the SAC fail to provide pertinent particularized facts and muddle key concepts, as they repeatedly conflate a "lead" (i.e., contact information supplied by users themselves) with a "referral" (which Zillow does not provide). Nowhere in these allegations do Plaintiffs describe (much less with particularity) a "referral" that is any different from "leads" that they elsewhere concede are proper. *See* SAC ¶¶ 30–31; *see also* Dkt. No. 37, Ex. 2 (HUD guidelines expressly stated that "[n]othing in RESPA prohibits joint advertising"). Nor do Plaintiffs, as this Court required, set forth "any allegations that a *specific* co-marketing agent referred mortgage business to a *specific* lender in exchange for paying its advertising costs to Zillow." 2018 WL 4735711, at *7 (emphases added). The only example AW2 offers is that an "agent wanted to cancel advertising for an account . . . 'because the lender doesn't want to pay anymore,'" SAC ¶ 44, but that allegation does not demonstrate that the lender was paying for *referrals* (rather than advertising alone). *See* 2018 WL 4735711 at *6 ("Zillow's co-marketing program, based on Plaintiffs' allegations, allows agents and lenders to jointly advertise their services without requiring agents to refer business to lenders."). To the extent Plaintiffs offer that lone example in order to show that lenders were frequently violating Zillow's policy against lenders shouldering the entire cost of a co-marketing program, a single vague anecdote falls well short of that mark. Nor, for that matter, do the AW2 allegations demonstrate that Defendants *knew* about any such conduct.

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Finally, this Court has already rejected Plaintiffs' only attempt to connect Zillow to a "referral" scheme—allegations concerning a 2015 webinar that the Court concluded "fall[] short of an instruction by Zillow for agents to refer lenders." *Id.* at *8.

In any event, even if the anonymous witness allegations were adequately specific (and they are not), the Court has already rejected Plaintiffs' primary theory of RESPA liability: "even if the Court draws an inference that co-marketing agents were making mortgage referrals, such referrals would fall under the Section 8(c) safe harbor because lenders received advertising services in exchange for paying a portion of their agent's advertising costs." *Id.* at *7. Plaintiffs' attempt to plead otherwise is again unaccompanied by any particularized facts, as discussed next.

2. Plaintiffs do not plead particularized facts demonstrating that lenders paid more than fair market value for advertising services.

There is no merit to Plaintiffs' reworked yet equally groundless (and even more confusing) theory of why Zillow's advertising services supposedly were not "fair market value" and outside the safe harbor under Section 8(c) of RESPA. *See* SAC ¶ 48. Their arithmetic is convoluted at best. And it starts from the false premise that a website they cite purported to quote an actual price for a "lead," when in fact that website explicitly was posing a hypothetical ("let's say it costs . . .") (https://www.ecommission.com/how-to-use-zillow-to-generate-more-sales-leads/).[3] In fact, "Zillow charges agents for advertising based on the number of impressions received, not on the number of leads received." 2018 WL 4735711, at *8. Plaintiffs all but disregard the important matter, noted by the Court, of the monetary value of prospective buyers "seeing [a lender's] information on a listing," i.e., the impression; in response, Plaintiffs simply assert without support that, in their view, Zillow did not "stress[]" this benefit of the co-marketing advertising program. SAC ¶ 48. There is no basis to conclude from Plaintiffs' allegations what the fair value of co-marketing is for any given lender in any given market at any given time; that is a matter that Zillow leaves to the lenders and real estate agents to determine

[3] The statements on this website, which is cited in Plaintiffs' SAC (¶ 48), are incorporated by reference into the SAC. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (incorporation-by-reference doctrine permits courts "to take into account documents 'whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading'").

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for themselves. Plaintiffs' allegations are not particularized facts; they are groundless speculation adding up to nothing that would change this Court's prior analysis:

> Just as co-marketing lenders can solicit a prospective buyer based on the receipt of a lead, prospective buyers can contact lenders based on seeing their information on a listing. Certainly this form of advertising, which is entirely separate from the receipt of leads or potential mortgage referrals, carries a monetary value for participating lenders. *Plaintiffs' fair market value theory does not account for this exposure. Nor do Plaintiffs' allegations account for the fact that lenders could place differing values on the advertising provided by the co-marketing program*—a consideration that is especially relevant given that Plaintiffs have not alleged that specific lenders were paying above fair market value for co-marketing services or how much that amount represented.

2018 WL 4735711, at *7–8 (emphases added). Thus, again, "Plaintiffs have not provided particularized facts that support their claim that co-marketing lenders were paying more than fair market value for the advertising services they received from Zillow in exchange for agents providing mortgage referrals." *Id.* at *8.

3. Plaintiffs' reference to a mortgage originator's consent judgment does not demonstrate that Defendants violated RESPA.

Plaintiffs also now note that "the mortgage originator Prospect Mortgage entered into a consent judgment with the CFPB where it admitted to violating Section 8 of RESPA," specifically by using "co-marketing arrangements on a 'third party website'" that Plaintiffs assert must have been Zillow. SAC ¶ 46. This allegation suffers from two fatal flaws. First, judicially noticeable facts demonstrate that it is simply false: Prospect Mortgage did *not* admit liability. Consent Order in the Matter of Prospect Mortgage LLC, CFPB (Jan. 30, 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_ProspectMortgage-consent-order.pdf. ("[Prospect Mortgage] has consented to the issuance of this Consent Order . . . *without admitting or denying any of the findings of fact or conclusions of law*") (emphasis added). Second, nothing in the SAC ties Zillow to Prospect Mortgage apart from Plaintiffs' conclusory assertion that the website that Prospect Mortgage was using must have been Zillow's. The allegations in the SAC demonstrate, at most, that the CFPB believed that Prospect Mortgage, not the unspecified third-party website, was breaking the law. And, nothing in

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paragraph 46 indicates that any of the Defendants knew anything about Prospect Mortgage's practices let alone encouraged them.

4. The CFPA does not impose aiding and abetting liability with respect to RESPA, and no particularized factual allegations support that theory in any event.

The SAC also includes a legal contention previously raised in Plaintiffs' opposition to the prior motion to dismiss, suggesting that the Consumer Financial Protection Act ("CFPA") authorizes aiding and abetting liability with respect to RESPA. SAC ¶ 35 (citing 12 U.S.C. § 5536); Dkt. No. 39, at 10–11. Plaintiffs' theory is incorrect as a matter of law. In the cited provision, the CFPA imposes liability on persons who "knowingly or recklessly" provide "substantial assistance" to certain principals, but only to the extent that the principal violates Section 5531 of Title 12 (prohibiting unfair, deceptive or abusive acts or practices). RESPA is not referenced in Section 5531. By specifying that the "substantial assistance" theory is viable in cases predicated on violations of Section 5531, Congress made clear that the substantial assistance theory is *not* available in cases predicated on other types of alleged violations (including RESPA violations). *See Central Bank of Denver v. First Interstate Bank of Denver,* 511 U.S. 164, 176 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so."); *see also Grady v. FDIC*, 2014 WL 1364932, at *7 (D. Ariz. Mar. 26, 2014) (RESPA does not include "any provision for 'aiding and abetting'"). And in any event, as before, Plaintiffs have pleaded no facts supporting the conclusion that Zillow "substantially assist[ed]" in any violation of Section 5531 or RESPA, let alone "knowingly or recklessly." 2018 WL 4735711, at *6 n.8. Indeed, the supposed violations Plaintiffs identify involve *circumventing* Zillow's policies. *E.g.*, SAC ¶¶ 44, 50.

5. The SAC's other allegations concerning purportedly misleading statements fail to demonstrate falsity for reasons already identified by the Court.

The SAC also retains the prior allegations that Defendants failed to disclose the existence of the CFPB investigation and made changes to the co-marketing program in response to that investigation. 2018 WL 4735711, at *9–10. Plaintiffs make no effort to improve on the

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allegations supporting those claims. The Court's prior analysis should therefore stand. For example, there is no reason to conclude that Defendants made misleading statements by altering the co-marketing program, as the SAC does not "contain particularized facts that demonstrate the co-marketing program was altered to 'remedy RESPA violations identified by the CFPB.'" *Id.* at *12; *see also, e.g.*, *Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 760 (7th Cir. 2007) (declining to infer securities fraud from policy change). Nor is there any reason to conclude that Defendants made misleading statements by not disclosing the pendency of the CFPB investigation, both because there is no general duty to disclose the initiation of an investigation and because Defendants' statements were "neither an affirmative statement nor omission that suggested Zillow was not under regulatory scrutiny." 2018 WL 4735711, at *10–11. The SAC, like the prior complaint, fails to plead falsity.

B. The SAC Again Fails to Plead Scienter

The Court previously "conclude[d] that the allegations in the amended complaint, taken collectively, support" not the inferences drawn by Plaintiffs, but "a contrary and more compelling inference—that Defendants believed the co-marketing program did not violate RESPA." 2018 WL 4735711, at *16. For example, that Mr. Rascoff and Ms. Philips thoroughly prepared for earnings calls supports the inference not "that [they] would have been aware that the co-marketing program violates RESPA," but instead "that [they] wanted to ensure that what [they] and other Zillow executives said on the call[s] was accurate." 2018 WL 4735711, at *14–15. And that Ms. Philips was both Zillow's CFO and CLO at most shows that she was likely aware of the CFPB's investigation, not that she made misleading statements about it or anything else. *Id.* at *15. The SAC adds nothing on these topics. Plaintiffs have also abandoned their allegations about Ms. Philips's stock sales, conceding, as the Court found, that they provide no basis to infer scienter. *See id.*

Indeed, nothing in the SAC warrants a conclusion different from the one the Court reached about the FAC. Like the FAC, the SAC fails to allege particularized facts giving rise to a "strong inference" of scienter—that is, an "inference of scienter cogent and at least as

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compelling as any opposing inference one could draw from the facts alleged." *Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007). By far the strongest inference is that Zillow consistently believed that its practices were lawful and that its disclosures were accurate.

For scienter purposes, the only material change in the SAC is the addition of AW2's allegations. SAC ¶¶ 43–44. According to AW2, "[e]very agent and lender knew that the Co-Marketing program was for the lender to get leads and referrals," "[e]veryone knew that the lenders paid the agents for leads and referrals," and "it was understood that lenders were paying for referrals." *Id.* ¶ 43. Courts consistently reject allegations just like these—that is, vague, unreliable hearsay that a practice was common knowledge—as too generic and conclusory to satisfy the PSLRA's scienter requirement. *See, e.g.*, *City of Roseville Emps. Ret. Sys. v. Sterling Fin. Corp.*, 963 F. Supp. 2d 1092, 1136 (E.D. Wash. 2013) ("everyone knew"); *Limantour v. Cray Inc.*, 432 F. Supp. 2d 1129, 1137–38, 1148–49 (W.D. Wash. 2006) ("common knowledge" or "talk"); *In re Allied Nevada Gold Corp.*, 2016 WL 4191017, at *11 (D. Nev. Aug. 8, 2016) ("common knowledge"); *In re Cornerstone Propane Partners, L.P. Sec. Litig.*, 355 F. Supp. 2d 1069, 1090 (N.D. Cal. 2005) ("everyone knew").

"These generalized claims about corporate knowledge are not sufficient to create a strong inference of scienter, since they fail to establish that the witness reporting them has reliable personal knowledge of the defendants' mental state." *Zucco Partners, LLC v. Digimarc*, 552 F.3d 981, 998 (9th Cir. 2009). Far from demonstrating a familiarity with Defendants' state of mind, the AW2 allegations amount to little more than "mere rumor and speculation," *In re Downey Sec. Litig.*, 2009 WL 736802, at *13 (C.D. Cal. Mar. 18, 2009), "lack[ing] any imprimatur of reliability," *In re Intelligroup Sec. Litig.*, 527 F. Supp. 2d 262, 360–61 (D.N.J. 2007); *see also N.Y. State Teachers' Ret. Sys. v. Fremont Gen. Corp.*, 2009 WL 3112574, at *11 (C.D. Cal. Sep. 25, 2009) ("the allegations do not establish that any of the confidential witnesses were in a position to gain personal knowledge of what Defendants saw, knew, or thought").

This Court rejected similarly unreliable allegations in *In re Zumiez Inc. Sec. Litig.*, 2009 WL 901934, at *8–9 (W.D. Wash. Mar. 30, 2009) (Coughenour, J.). There, as here, "broad

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allegations" were ascribed to confidential witnesses "without setting forth the basis for the opinions or providing any facts to suggest that the witnesses were positioned to accurately assess the Company's performance on such a broad scale." *Id.* at *8. The *Zumiez* complaint reported, through low-level confidential witnesses, that sales were lackluster in stores across the country, but those allegations were not pleaded "with sufficient indicia of reliability" except as to the handful of stores with which the witnesses were personally familiar. *Id.* at *9.

The same result follows here. At most, the complaint suggests that AW2 was familiar with training practices in Denver and Orange County, not across the country. SAC ¶ 43. Plaintiffs supply no reason that AW2 would be in a position to know about company-wide matters, much less Defendants' state of mind. The SAC states only that "when [AW2] asked Zillow management questions about the Co-Marketing program, she was 'reminded to not ask questions'" (SAC ¶ 44)—an allegation so vague as to convey almost nothing. Plaintiffs do not allege to whom AW2 spoke or even what questions she asked about the co-marketing program. This is a far cry from particularized facts showing "that Zillow designed the co-marketing program to violate RESPA" or "statements evinc[ing] a strong inference of scienter." 2018 WL 4735711, at *18.

Finally, contrary to their contentions, Plaintiffs' expanded allegations concerning a wrongful termination suit filed against Zillow (SAC ¶¶ 50–51) do not remotely demonstrate scienter on the part of Mr. Rascoff. As the Court previously concluded after reviewing similar allegations, the SAC "does not offer particularized facts to explain how the conduct in the other lawsuit violated RESPA." 2018 WL 4735711, at *14. Plaintiffs appear to suggest that one or more lenders may have surreptitiously been paying more than fair market value for advertising, but do not allege any facts demonstrating that such payments were made in exchange for referrals. SAC ¶¶ 50–51. In any event, Plaintiffs neglect to mention that the very same complaint on which they rely reveals that Defendants *repudiated* the conduct by terminating employees who were not complying with corporate policy. *See Boehler v. Zillow, Inc.*, No. 8:14-cv-01844-DOC-DFM, Dkt. No. 32 at *10 (C.D. Cal. June 22, 2015) (alleging that as a result of

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an email to "Zillow's upper management," "certain Zillow employees were terminated").

Accordingly, by far the most compelling inference, once again, is the innocent one. The facts alleged in the SAC depict a company committed to following the law, and advising its investors of its view of the evolving legal landscape and the steps it takes as it "endeavors" to ensure compliance. Plaintiffs fail to plead a strong inference of scienter.

C. The SAC Again Fails to Plead Loss Causation

Plaintiffs have again failed to plead loss causation. 2018 WL 4735711, at *17. Defendants respectfully submit that they cannot do so.

As the Court recognized in evaluating Defendants' prior motion to dismiss, in the context of disclosures about regulatory inquiries, the requirement of loss causation means the plaintiff must allege "that the defendant's fraud was '*revealed* to the market and *caused* the resulting losses.'" *Loos v. Immersion Corp.*, 762 F.3d 880, 887 (9th Cir. 2014); *accord* 2018 WL 4735711, at *17. Moreover, the Ninth Circuit has held that loss causation must be pleaded "with particularity." *Oregon Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 605 (9th Cir. 2014); Fed. R. Civ. P. 9(b). The allegations must show that the market "'learned of and reacted to th[e] fraud'" as opposed to other news. *Loos*, 762 F.3d at 887–88 (quoting *Metzler*, 540 F.3d at 1063). And a disclosure that reveals only "a 'risk' or 'potential' for widespread fraudulent conduct" does not establish loss causation. *Metzler*, 540 F.3d at 1064. Although the Court previously left open the possibility that disclosure of the CFPB's stated settlement position could form part of a viable loss causation theory, 2018 WL 4735711, at *17, Plaintiffs here cannot adequately plead such a theory, because the disclosure of the CFPB's position is the *sole* supposed corrective disclosure, and it did *not* "reveal" falsity in the statements at issue.

As the Court explained elsewhere:

> Plaintiffs assume that [alleged] RESPA violations can be inferred from the company's August 2017 disclosure that the CFPB had invited Zillow to discuss a possible settlement and indicated that it intended to pursue further action if those discussions did not result in a settlement. The Court does not agree . . . .

Id. at *7 n.9. That conclusion is unquestionably correct, and it should control the loss causation

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analysis as well. Just as a RESPA violation cannot be "inferred" from the disclosure about the CFPB's stated settlement position, the disclosure did not "reveal" falsity (let alone fraud) to the market. *Loos*, 762 F.3d at 887; 2018 WL 4735711, at *17. At most, the disclosure revealed the CFPB's (expansive) position about what the law should be—another development in the "constantly evolving" legal landscape that Zillow had already described, along with how it "endeavored" to ensure compliance even though "it did not believe it was subject to 'federal laws and regulations relating to real estate, rentals and mortgages.'" 2018 WL 4735711, at *16. The D.C. Circuit's rejection of the CFPB's expansive view of RESPA underscores the point: Zillow's disclosure of an aggressive position taken by a regulator, especially one premised on an erroneous legal theory, did not reveal fraud to the market. *See PHH Corp. v. CFPB*, 881 F.3d 75, 83 (D.C. Cir. 2018) (en banc) (reinstating panel decision insofar as it relates to interpretation of RESPA); *PHH Corp. v. CFPB*, 839 F.3d 1, 40–41 (D.C. Cir. 2016) (rejecting CFPB's interpretation of Section 8 of RESPA). And Plaintiffs do not and cannot allege that any findings indicating fraudulent conduct by Zillow are forthcoming from the CFPB. *See Baker*, 2018 WL 5723146, at *5 (noting that the CFPB investigation closed months ago); *cf.* 2018 WL 4735711, at *3. Thus there can be no viable theory of loss causation.

Finally, the fact that Plaintiffs purchased their shares after disclosure of the CFPB's investigation (but before its position was revealed) underscores the conclusion that they cannot plead loss causation. Disclosure of the CFPB's invitation to enter into settlement talks could not reveal any falsity in Zillow's statements that it endeavored and intended to comply with the law. Plaintiffs purchased their shares knowing that the CFPB was reviewing the co-marketing program for compliance with RESPA. SAC ¶ 90. Courts do not countenance litigants' attempts to "transform a private securities action into a partial downside insurance policy." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347–48 (2005).

D. Leave to Amend Should be Denied

Despite three bites at the apple, Plaintiffs remain nowhere close to adequately pleading claims under the Securities Exchange Act. Because another opportunity to amend their

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complaint would be futile, the Court should deny Plaintiffs leave to amend and dismiss their claims with prejudice.

Denying leave to amend is "'within the sound discretion of the trial court.'" *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185–86 (9th Cir. 1987). Doing so is justified where there is a "dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Discretion to dismiss without leave to amend is "'particularly broad'" "where the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to its claims." *Zucco*, 552 F.3d at 1007.

Leave to amend is unwarranted here because any amendment would be futile. The Court already gave Plaintiffs an opportunity to amend their complaint to assert particularized facts. The Court provided Plaintiffs specific instructions about what their new allegations must show—including "that Zillow designed the co-marketing program to violate RESPA, and that Zillow was instructing and encouraging third-parties to commit such violations." 2018 WL 4735711, at *18. Plaintiffs responded only with vague hearsay and window dressing. And there is no reason to expect that the result would be any different given another opportunity to amend. *See, e.g.*, *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bur.*, 701 F.2d 1276, 1293 (9th Cir. 1983) ("Asked the purpose of amendment, [plaintiff's] attorney could only answer vaguely" concerning allegations that, even if amended, "could not affect the outcome of this lawsuit"); *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) (affirming dismissal without leave to amend in securities action because no amended complaint could plead materiality). Here, exactly as in *Zucco*, "[t]he fact that [Plaintiffs] failed to correct these deficiencies in [the SAC] is 'a strong indication that the plaintiffs have no additional facts to plead.'" 552 F.3d at 1007; *see also Callan v. Motricity Inc.*, 2013 WL 5492957, at *8 (W.D. Wash. Oct. 1, 2013) (dismissing, with prejudice, amended complaint that "repeats, with only minor changes, what the Court has already rejected").

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The conclusion that Plaintiffs do not have facts sufficient to support their claims is underscored by their counsel's representations to another district court after their belated filing of a FOIA action in the hope of finding something to support their claims (though they do not specify what). Plaintiffs' counsel (unsuccessfully) sought injunctive relief in that action on the ground that "[t]he fruits of [their] FOIA request *will be critical* to alleging the additional facts needed to support the class action plaintiffs' claims." *Baker*, 2018 WL 5723146, at *4 (emphasis added). But the preliminary injunction was denied—in part because of counsel's unexplained delay in proceeding, and in part because of the merely "theoretical" possibility that any documents that might ultimately be produced by the government could change the outcome in this case. *Id.* at *2–5 (addressing the CFPB's "Zillow investigation, which ended over four months ago").[4]

The Court can reasonably infer—from the representations in the FOIA litigation, and from the meager new factual allegations in the SAC—that Plaintiffs "'have no additional facts to plead'" in support of their conclusory allegations. *Zucco*, 552 F.3d at 1007.

IV. CONCLUSION

For the foregoing reasons, and for the reasons expressed in this Court's order dismissing Plaintiffs' FAC, Defendants respectfully request that this Court dismiss Plaintiffs' SAC with prejudice and without leave to amend.

[4] Similarly, the Court should reject any effort by Plaintiffs to rely on the pending FOIA action as a basis for either a stay or further leave to amend their complaint. Courts confronting similar litigation strategies—file first, investigate later—have rightly resisted plaintiffs' calls to postpone their day of reckoning by granting them leave to amend, holding such requests to be dilatory, futile, or both. *See, e.g.*, *Ong v. Chipotle Mex. Grill, Inc.*, 294 F. Supp. 3d 199, 240 (S.D.N.Y. 2018); *Lerner v. Immelt*, 2012 WL 2197456, at *2–3 (S.D.N.Y. June 15, 2012). Permitting Plaintiffs to drag out this litigation so that they may have further time to search for hypothetically helpful documents would be contrary to the purpose of the PSLRA.

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DATED: December 17, 2018

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CERTIFICATE OF SERVICE

I certify that on December 17, 2018, I electronically filed the foregoing Motion to Dismiss the Second Amended Complaint with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses indicated on the Court's Electronic Mail Notice List.

DATED this 17th day of December, 2018.

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THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re Zillow Group, Inc., Securities Litigation This Document Relates to: All Actions	Master File: C17-1387-JCC **[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)**

This matter came before the Court on Defendants' Motion to Dismiss the Consolidated Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) (the "Motion to Dismiss"). The Court has considered the pleadings and papers filed by the parties in connection with the Motion to Dismiss, the arguments of counsel, and all other matters properly before the Court.

IT IS HEREBY ORDERED that:

1. The Motion to Dismiss is GRANTED in its entirety.
2. The Consolidated Second Amended Complaint is DISMISSED WITH PREJUDICE AND WITHOUT LEAVE TO AMEND.
3. The clerk is DIRECTED to enter judgment accordingly.

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DATED this _____ day of _____, 2019.

_____
Hon. John C. Coughenour
United States District Court Judge

Presented by:

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